RENDERED: MAY 17, 2019; 10:00 A.M.
TO BE PUBLISHED

OPINION OF FEBRUARY 1, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000344-MR

RIVER CITY FRATERNAL ORDER OF POLICE
LODGE 614, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 16-CI-00757

LOUISVILLE/JEFFERSON COUNTY
METROPOLITAN GOVERNMENT ACTING
THROUGH ITS POLICE DEPARTMENT APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: River City Fraternal Order of Police Lodge 614, Inc. ("FOP")[1] appeals from an opinion and order entered by the Jefferson Circuit Court on January 18, 2018, denying FOP's motion for summary judgment and dismissing its breach of contract claims against Metro. FOP alleges Metro twice violated the Collective Bargaining Agreement ("CBA") which restricts the age of prior disciplinary actions to be considered in punishing a Metro police officer for a current incident. FOP maintains the proper remedy for Metro's violations—as suggested by an "advisory" arbitrator—is reinstatement of Metro Police Officer Kristen Shaw with back pay and benefits. Metro amended its custom of forwarding to decision-makers all reprimands and suspensions rather than a maximum of five years of punishment as allowed by the CBA, and considered reinstating Shaw, but ultimately rejected any reduction in penalty. Having reviewed the briefs, law and record, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On August 13, 2013, multiple Metro police units responded to an emergency dispatch at a private residence. On arrival, they discovered a physical altercation between two off-duty law enforcement officers. After the disturbance,

[1] FOP is the collective bargaining representative of police officers employed by Louisville/Jefferson County Metro Government ("Metro").

Chief of Police Steve Conrad fired Shaw on June 18, 2014.[2] Represented by FOP, Shaw appealed her dismissal to the Louisville Metro Police Merit Board ("Board") which upheld the termination after a two-day hearing.[3]

In advance of the Board hearing, Shaw identified five annual evaluations—dated 2010 through 2014—she intended to introduce as exhibits. During a five-day window[4] for objections, Metro said nothing. At the hearing, Shaw introduced the evaluations—each showing she routinely met or exceeded her superiors' expectations. Metro sought to counter the evaluations with a chart prepared by Metro's Professional Standards Unit ("PSU") reflecting Shaw's entire disciplinary record from 2007 through 2011—two written reprimands and four suspensions.

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[2] Chief Conrad's letter terminating Shaw's employment found Shaw had violated multiple Standard Operating Procedures, specifically: 5.1.3 Conduct Unbecoming (drove marked patrol car in reckless manner); 5.1.5 Truthfulness/Untruthfulness (made false statements about using police equipment/databases to gain information); 5.1.4 Obedience to Orders (violated order to have no contact with other officer/family by sending emails); 4.20.5 Usage Restrictions (used CourtNet and NCIC to gain information about other officer/family for personal benefit); and, 4.14.7 Vehicle Usage (traveled at high rate of speed and disregarded traffic control devices).

[3] The entire hearing is not part of the certified record, but the parties have provided excerpts.

[4] Section 6.1 of the Board's Hearing Procedures requires parties to exchange names of proposed witnesses and evidence ten calendar days before the hearing date. Section 7.1 requires a party opposing admissibility or introduction of a document, report or exhibit to file a written objection five calendar days before the hearing date. Sections 6.1 and 7.1 were attached as exhibits to the FOP's motion for summary judgment, as was Shaw's pre-hearing list of witnesses and exhibits bearing a service date of September 5, 2014. Neither Metro's pre-hearing disclosure nor any objection to FOP's disclosure is in the appellate record.

FOP objected. Citing Article 17, Section 3(D)[5] of the CBA, FOP noted five of the six items Metro proposed to introduce were too old to be considered. In response, Metro argued Shaw's introduction of evaluations outside the five-year range applicable to disciplinary measures "opened the door" for its use of Shaw's entire disciplinary file. FOP insisted the CBA contains no age limit on evaluations, making them all admissible.[6] The Board rejected Metro's

[5] Article 17, Section 3(D) specifies:

> D. No previous discipline against a Member may be considered by Metro Government or the Chief as the basis for any subsequent discipline or an involuntary transfer except as follows:
>
> > i. A previous written reprimand may be considered for one (1) year following the issuance of the reprimand.
> >
> > ii. A previous suspension of seventy-two (72) hours or less, or an involuntary transfer may be considered for three (3) years following the issuance of the suspension.
> >
> > iii. A previous suspension of over seventy-two hours may be considered for five (5) years following the issuance of the suspension.

[6] Article 18 of the CBA governs member personnel files. Section 3, A. specifies each officer's "official Board personnel file" shall include "performance evaluations" and a "copy of reprimands and disciplinary actions" in addition to other named items. Section 3, C. permits the Chief of Police to maintain a file on each officer containing "copies of performance evaluations including supporting documentation" and "copies of reprimands and disciplinary actions" in addition to other items "necessary for program operations."

An affidavit executed on October 12, 2016, by David Mutchler, FOP President—after the Board hearing had concluded—states the CBA "does not, and never has, prohibited either side from considering prior performance appraisals, as distinct from disciplinary action. This is true regardless of how old a performance appraisal might be. Metro Louisville never asked for any time limitation on consideration of performance appraisals."

attempted reliance on the chart but allowed it to be placed in the record by avowal. Addressing the evidentiary issue in its findings and order, the Board stated it did not deem the chart "to be appropriate evidence and does not base its decision on anything falling outside the period allowed by the [CBA] and Louisville Metro Government."

FOP maintains it learned for the first time at Shaw's hearing the PSU routinely prepared a chart of all past discipline for every officer facing charges. As was PSU's custom, Shaw's chart was provided to Chief Conrad before he decided to terminate her employment and to the Board before it affirmed the termination.

Chief Conrad testified at the hearing he knew the chart was in Shaw's file, but did not consider it in levying punishment. When asked whether "any of those disciplinary proceedings play a part in your determination as to whether there were facts to support the violation you found, or the level of discipline that you imposed in this case," Chief Conrad replied, "No, sir. None whatsoever." In affirming Shaw's dismissal, the Board reiterated it was

> aware of the FOP Contract provision prohibiting consideration of disciplinary history earlier than a certain period of time prior to an episode such as this and concludes that it will not consider such history.

Thus, while both Chief Conrad and the Board acknowledged having access to Shaw's entire disciplinary history, both indicated stale information was not used in deciding to terminate her employment with Metro.

The Board hearing spawned two separate lawsuits filed by different plaintiffs and assigned to different divisions of Jefferson Circuit Court. As permitted by KRS[7] 67C.323(3)(a) and Article 12 of the CBA,[8] Shaw, in her name alone, appealed Metro's decision to terminate her employment.[9] FOP moved to intervene in Shaw's suit—seeking to allege Metro had breached the CBA—but that request was denied because the "burden of proof in a breach of contract case is significantly different to that in an administrative agency decision appeal." Finding joinder to be unnecessary, Division 9 stated FOP "is not barred from seeking its breach of contract claims in a separate action." Ultimately, Division 9 entered an order affirming Shaw's termination because it "was based on Shaw's own admissions to the violations." Shaw appealed the Division 9 order to this

[7] Kentucky Revised Statutes.

[8] Section 1 reads in relevant part, "[a]ll disciplinary matters shall be appealed pursuant to state statute and the rules and regulations of the Louisville Police Merit Board."

[9] *Shaw v. Louisville/Jefferson County Metropolitan Government Acting Through its Police Department*, Jefferson Circuit Court Action No. 15-CI-01408l. Appeal of the disciplinary action was assigned to Division 9 which will be referenced as "Division 9" throughout this Opinion to avoid confusion with *River City FOP Lodge 614 v. Louisville/Jefferson County Metro Government*, Jefferson Circuit Court Action No. 16-CI-000757, the breach of contract action subsequently filed by FOP in Jefferson Circuit Court and assigned to Division 3. Dismissal of the breach of contract action gives rise to this appeal and will be referenced as "Division 3."

court where another panel affirmed the termination as being supported by substantial evidence.[10]

While Shaw's personal challenge to her termination wound its way through Division 9 and then through this Court, FOP alleged Metro's contract violations in its own name through another aspect of Article 12, Section 1 of the CBA which reads:

> **[a]ny controversy between Metro Government and the [FOP] concerning the meaning and application of any provisions of this Agreement shall be adjusted in the manner set out below.** Both parties agree that disciplinary matters are not subject to the grievance procedure contained in this Agreement. All disciplinary matters shall be appealed pursuant to state statute and the rules and regulations of the [Board]. **The [FOP]** or any Member **may file a grievance and shall be afforded the full protection of this Agreement** and the right to legal counsel.

(Emphases added.) FOP chose to submit Metro's alleged breach of contract claims to "advisory arbitration" as allowed by Article 12, Section 2, Step 4 of the CBA which reads in part:

> [i]f the aggrieved or the [FOP] is not satisfied with the answer obtained in Step 3, either may seek **advisory arbitration** within fourteen (14) days after the receipt by the aggrieved of the Step 3 answer.

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[10] *Shaw v. Louisville/Jefferson County Metropolitan Government Acting Through its Police Department*, Case No. 2017-CA-000867-MR, 2018 WL 3954278 (Ky. App. Aug. 17, 2018) (unpublished).

(Emphasis added.) The CBA does not define "advisory arbitration."

FOP and Metro jointly chose arbitrator Carl Jenks to determine whether Metro had twice violated the CBA's Article 17, Section 3(D), by providing a chart of Shaw's entire disciplinary history to Chief Conrad and then to the Board. If Jenks found a violation, both FOP and Metro asked Jenks to suggest an appropriate remedy. Following an evidentiary hearing and oral argument—neither of which is part of the certified record on appeal—Jenks rendered an arbitration opinion and award finding Metro had violated the CBA. Further, because those violations preceded imposition of punishment, Jenks believed the stale discipline may have tainted the decision to terminate Shaw's employment. Acknowledging his opinion was purely "advisory"—as opposed to being final and binding—Jenks proposed a two-pronged "remedy." First, Metro should comply with Article 17, Section 3(D), and cease providing the Chief and Board out-of-bounds disciplinary information. Second, recognizing Shaw's conduct warranted disciplinary action, Jenks stated, "consideration for mitigating this discharge to the lesser penalty of suspension would be appropriate."

Metro acted on both of Jenks' suggestions. First, at Chief Conrad's direction, the PSU ceased compiling and providing the Chief and Board a chart of an officer's entire disciplinary file. Second, Metro considered reducing Shaw's

penalty from termination to suspension, but ultimately rejected lessening the penalty because Shaw's conduct was so egregious.

Dissatisfied Shaw was not reinstated as Jenks suggested, on February 16, 2016, FOP filed the instant suit in Jefferson Circuit Court alleging Metro had twice violated the CBA and demanding Shaw's reinstatement with back pay and benefits. Metro answered the complaint, arguing FOP had failed to state a cause of action on which relief could be granted and affirmatively asserting Division 3 lacked jurisdiction to hear Shaw's termination because it was already being heard in Division 9 pursuant to KRS 67C.323 and Article 17 of the CBA. Metro further argued FOP lacked standing to seek Shaw's reinstatement because Article 12, Section 1 of the CBA specifies:

> [b]oth parties agree that disciplinary matters are not subject to the grievance procedure contained in this Agreement. All disciplinary matters shall be appealed pursuant to state statute and the rules and regulations of the [Board].

Thus, Metro argued FOP was seeking relief unavailable under the agreed-upon terms of the CBA—essentially making an end run around the CBA to achieve Shaw's reinstatement. As a result, Metro requested dismissal of the complaint.

On October 14, 2016, FOP moved for summary judgment alleging: there was no genuine dispute as to the material facts; FOP was entitled to judgment as a matter of law; and, the court should defer to Jenks. Alternatively, FOP moved

for partial summary judgment—seeking a finding Metro had violated the CBA and a trial date to determine the appropriate remedy.

On January 5, 2017, Metro replied to FOP's summary judgment motion, agreeing there were no genuine issues of material fact; opposing entry of summary judgment; and for the second time, urging dismissal of the complaint. Metro argued it had fully complied with Jenks' opinion—stressing it was merely "advisory," and noting Metro PSU now forwards to the Chief and Board only timely suspensions and reprimands, and, Metro considered, but ultimately rejected, reducing Shaw's termination. On January 12, 2017, the FOP responded to Metro's reply, but did not address requested dismissal of the complaint.

Division 3 denied FOP's request for summary judgment—the only summary judgment motion filed by either party—and dismissed the complaint as requested by Metro, concluding Metro had complied with Jenks' suggestions and the CBA's terms give the Board sole authority to resolve all disciplinary disputes between FOP members and Metro. As a result, Division 3 deemed the action pending in Division 9 to be the proper venue for any appeal of Shaw's termination. Division 3 also noted the CBA allows the Chief to maintain in his/her office a complete file of each officer's suspensions and reprimands, "even if he is not allowed to consider that information in making present disciplinary decisions." Chief Conrad testified he knew of Shaw's record, but did not consider it in

dismissing her. The Board twice stated it knew the CBA's time limits on prior disciplinary actions and did not consider stale information in reaching its decision. FOP timely appealed.

ANALYSIS

FOP mischaracterizes this appeal as an attack on *sua sponte* entry of summary judgment in favor of Metro, arguing the trial court granted Metro summary judgment without Metro having moved for it and without giving FOP an opportunity to respond to such a request. We disagree.

First, Division 3 did not *sua sponte* enter summary judgment on behalf of any party. FOP was the only party to move for summary judgment—a motion Division 3 denied. FOP admitted in its original brief it is not challenging denial of its motion on appeal.

Second, Metro asked for dismissal in both its answer to the complaint, and in its reply brief to FOP's summary judgment motion. The trial court did not dismiss the complaint out of the blue. FOP responded to Metro's reply brief, but either overlooked—or chose to ignore—Metro's requested dismissal of the case—twice. Furthermore, Metro's request for dismissal—the functional equivalent of a CR[11] 12.02 motion to dismiss—was converted into a motion treated as a request

[11] Kentucky Rules of Civil Procedure.

for summary judgment under CR 56.03 when matters outside the pleadings[12] were presented to and not excluded by Division 3. This was entirely appropriate.

Green v. Bourbon County Joint Planning Commission, 637 S.W.2d 626, 629-30 (Ky. 1982) (citing *Collins v. Duff*, 283 S.W.2d 179, 183 (Ky. 1955)) (wherein plaintiffs did not move for summary judgment for themselves, but merely opposed defendant's motion for summary judgment), holds CR 56 relief may be granted to a party who has not formally requested such so long as all "pertinent issues" are before the judge when considering a summary judgment motion. Here, neither party claims less than all the relevant issues were before the court. Thus, *Green* describes this case precisely. FOP moved for summary judgment; Metro did not, but opposed FOP's motion and urged dismissal of the complaint. FOP's summary judgment motion put the question of summary judgment for either party squarely before Division 3. As explained in *Collins*, and quoted with favor in *Green*,

> where overruling the defendant's motion for summary judgment necessarily would require a determination that the plaintiffs were entitled to the relief asked, a motion for summary judgment by the plaintiffs would have been a useless formality. *See Hennessey v. Federal Security Administrator, D.C.*, 88 F.Supp. 664; *Hooker v. New*

[12] CR 7.01 limits "pleadings" to the complaint and answer, reply to counterclaim, answer to cross-claim, as well as a third-party complaint (if leave to file is granted) and third-party answer thereto.

> *York Life Ins. Co.*, D.C., 66 F.Supp. 313; 3 Moore's Federal Practice, 1st Ed., sec. 56.02, p. 3183.

Collins, 283 S.W.2d at 183; *Green*, 637 S.W.2d at 629-30. Division 3 did not err in dismissing the complaint, thereby giving Metro the functional equivalent of summary judgment.

Turning to the merits, FOP argues the court should have deferred to Jenks entirely and reinstated Shaw as the only appropriate penalty for Metro's violations of the CBA. Again, we disagree. "Advisory arbitration" is an option available to a disgruntled party under the CBA. When Metro declined to reinstate Shaw, FOP elected that option, but now complains because neither Metro, Division 3, nor Jenks accorded Jenks' suggested penalty "final and binding" status.

Very little has been written about "advisory arbitration."[13] We define the term as nonbinding arbitration resulting in a recommendation the parties are free to consider but not required to adopt. Clearly, "advisory arbitration"[14] is not the equivalent of "final and binding arbitration"—although FOP wants it to be.

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[13] Merriam–Webster's Collegiate Dictionary, Tenth Edition, defines the word "advisory" as having authority to advise and perhaps recommend action. Black's Law Dictionary, Tenth ed. 2014, defines an "advisory opinion" as "[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose."

[14] FOP's citation to multiple arbitration cases is for naught. None contains the term "advisory arbitration." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965) (binding arbitration); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960); *Housing Authority of Louisville v. Service Employees Intern. Union, Local 557*, 885 S.W.2d 692 (Ky. 1994).

Adopting FOP's position would require us to read the CBA as vesting in Jenks full decision-making authority to resolve disciplinary matters. Such a position would contradict Article 12, Section 2, Step 4 of the CBA which expressly forbids an arbitrator from overstepping specified boundaries. That provision directs:

> [t]he arbitrator shall have no jurisdictional right to alter, amend, modify, disregard, add to or subtract from or change in any way any term or condition of this Agreement or to render an award which is in conflict with any provision of this Agreement.

FOP's proposed interpretation of the CBA—Jenks' recommendation, even though advisory, must be enforced—would also contradict Article 12, Section 1 of the CBA which specifies, "disciplinary matters are not subject to the grievance procedure contained in this [CBA]."[15] An appellate court cannot *carte blanche* grant decision-making authority to an advisory arbitrator in contravention of legitimately negotiated terms adopted by the parties. Here, we can read no more into the CBA than the parties authored.

[15] Other provisions of the CBA are also relevant. Article 1 specifies, the CBA "shall not extend to matters of inherent managerial policy[.]" Article 4, Section 1 states, FOP "recognizes the prerogative of Metro Government to operate and manage its affairs in all respects in accordance with its responsibilities, and that the powers of authority which have not been officially abridged, delegated or modified by this Agreement are retained by Metro[.]" Under Article 4, Section 2, Metro's exclusive rights include, "e. take disciplinary action subject to KRS 67C.301 to KRS 67C.327 and the rules and regulations established by the [Board.]" Article 4, Section 4, "[n]othing in this [CBA] shall be construed as delegating to others the authority conferred by law on Metro Government, or in any way abridging or reducing such authority."

> "'In the absence of ambiguity, a written instrument will be enforced strictly according to its terms,' and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 687 (Ky. 2012) (quoting *Frear v. P.T.A. Industries, Inc*., 103 S.W.3d 99, 106 (Ky. 2003).) [sic] "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Hazard Coal Corporation v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (citation omitted). "When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions." *3D Enterprises Contracting Corporation v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005) (citation omitted). If the language is ambiguous, the court's primary objective is to effectuate the intentions of the parties. *Cantrell Supply, Inc. v. Liberty Mutual Insurance Company*, 94 S.W.3d 381, 384 (Ky. App. 2002). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Abney v. Nationwide Mutual Insurance Company*, 215 S.W.3d 699, 703 (Ky. 2006) (quoting *Cantrell*, 94 S.W.3d at 385). The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law to be determined *de novo* on appellate review. *Id*.

Kentucky Shakespeare Festival, Inc. v. Dunaway, 490 S.W.3d 691, 694-95 (Ky. 2016). Neither party has alleged ambiguity. Therefore, we must enforce the CBA according to its terms. *Wehr*, 384 S.W.3d at 687. Hence, Jenks' suggested resolution is nothing more than a suggestion with which Metro fully complied. It changed its custom and no longer provides an officer's entire file. Metro then

considered reducing Shaw's termination. However—as was its prerogative—Metro decided the egregiousness of Shaw's actions demanded termination. FOP could reasonably expect nothing more.

FOP argues the trial court failed to defer to Jenks' decision—appearing to equate "defer" with "abdicate." We reject FOP's position. An appeal to a circuit court must be more than the rubber stamp of an "advisory arbitration" opinion and award—otherwise it is a waste of judicial time and resources and merely delays the inevitable. The CBA—to which FOP agreed—places ultimate decision-making responsibility for disciplinary decisions with the Board, not an advisory arbitrator. If FOP wanted binding arbitration with the arbitrator's decision being the final word, it should have agreed to nothing less. It agreed to less and we have no authority to give it more.

In construing the CBA, we try to give effect to the parties' intentions using the words they chose. "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *Cantrell Supply,* 94 S.W.3d at 384-85. We can neither omit the word "advisory," ascribe to it an unreasonable definition, nor delegate authority the parties did not extend.

FOP argues Division 3's grant of summary judgment to Metro denied FOP the opportunity "to produce contrary facts and make an organized response to such motion." This argument is curious. The record contains no evidence FOP

sought—or was denied—an opportunity to offer facts or undertake discovery. The record is succinct. FOP filed its complaint, supported by a copy of Jenks' arbitration opinion and award. Metro answered the complaint. In short order, FOP moved for summary judgment supported by a lengthy memorandum and numerous exhibits. Metro responded to the summary judgment motion—opposing it and urging dismissal—to which FOP replied. While the appellate record contains no transcript or recording, it appears the case was orally argued on February 15, 2017. We do not know what transpired that day. A status hearing apparently occurred on January 17, 2018, but without a transcript or recording, we have no indication what happened during the status hearing. An opinion and order was entered the following day denying FOP's motion for summary judgment and dismissing the case as Metro had requested. No motion to reconsider was filed. There were no requests for discovery and there is no indication any facts could turn the tide in FOP's favor.

FOP claims Division 3 should have set a trial date when it denied FOP's motion for summary judgment. Instead, it dismissed the action. FOP has not shown dismissal was unjustified. While FOP may not have foreseen dismissal, it was foreshadowed by Metro's request for it—twice.

FOP admits Shaw's appeal of her termination "is a completely separate cause of action" from FOP's breach of contract claims. However, FOP

demanded Shaw's reinstatement with back pay and benefits in its complaint. FOP repeated that demand in its memorandum in support of its summary judgment motion. By demanding relief disallowed by the CBA, FOP attempted to rewrite the contract to which it agreed. Article 12, Section 4 of the CBA confirms:

> [t]he grievance procedure contained in the [CBA] is the sole and exclusive means of resolving all grievances arising under this [CBA].

The grievance procedure adopted by the parties calls for "advisory arbitration" and that is exactly what occurred.

Consistent with our definition of the term "advisory arbitration," after being found to be in violation of the CBA, Metro considered reducing Shaw's penalty from termination to suspension which is all Jenks' suggested. Metro having done as Jenks proposed, there was nothing more for Division 3 to require Metro to do. Requiring Division 3 to force Metro to reinstate Shaw with back pay and benefits—which is the result FOP seeks—is not the remedy Jenks proposed. Jenks wrote only, "consideration for mitigating this discharge to the lesser penalty of suspension would be appropriate." FOP is seeking a remedy beyond that allowed by the CBA and beyond that suggested by Jenks.

Granting FOP's demand would create a result inconsistent with Division 9's prior finding of termination being justified by Shaw's own

admissions—a result a prior panel of this Court has already affirmed. FOP now urges us to reach an opposing result. Such is untenable.

For the reasons explained above, Division 3 did not err in dismissing FOP's breach of contract claims. Metro has changed its policy to conform with Article 17, Section 3(D) of the CBA. Metro also considered reinstating Shaw. FOP is entitled to nothing more. Division 3's dismissal of the action is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
David Leightty Louisville, Kentucky	Walter A. Sholar Louisville, Kentucky